# STATE OF MICHIGAN

# COURT OF APPEALS

FRANK L. WARCHOL as Grantor Trustee of the Frank L. Warchol Living Trust, VIRGINIA J. WARCHOL, as Grantor Trustee of the Virginia J. Warchol Living Trust, and RICHCRAFT INDUSTRIES, INC.,

Plaintiffs-Appellees,

v

DYNAMIC CONTROL INTERNATIONAL, INC., and APPLIED COMPUTER ENGINEERING, INC.,

Defendants,

and

AEROSPACE MACHINING INTERNATIONAL, INC. d/b/a GRIFFON DEFENSE SYSTEMS, INC.,

Defendant-Appellant.

UNPUBLISHED
October 20, 2015

No. 322029
Macomb Circuit Court
LC No. 2012-000964-CK

FRANK L. WARCHOL as Grantor Trustee of the Frank L. Warchol Living Trust, VIRGINIA J. WARCHOL, as Grantor Trustee of the Virginia J. Warchol Living Trust, and RICHCRAFT INDUSTRIES, INC.,

Plaintiffs-Appellees,

v

DYNAMIC CONTROL INTERNATIONAL, INC., and APPLIED COMPUTER ENGINEERING, INC.,

Defendants-Appellants,

and

No. 322033
Macomb Circuit Court
LC No. 2012-000964-CK

AEROSPACE MACHINING INTERNATIONAL, INC. d/b/a GRIFFON DEFENSE SYSTEMS, INC.,

Defendant.

---

Before: FORT HOOD, P.J., and CAVANAGH and K. F. KELLY, JJ.

PER CURIAM.

This consolidated appeal arises from a judgment granting plaintiffs, the Frank L. Warchol Living Trust, the Virginia J. Warchol Living Trust, and Richcraft Industries Inc. (collectively plaintiffs), judgment against defendants, Applied Computer Engineering, Inc. (ACE), Dynamic Control International Inc. (DCI), and Aerospace Machining International, Inc. (AMI).

In Docket No. 322029, AMI challenges the trial court's determinations that it: 1) violated Michigan's Uniform Fraudulent Transfer Act (MUFTA), MCL 566.31 *et seq.*; 2) was liable to plaintiffs as a successor to DCI; and, 3) engaged in civil conspiracy.

In Docket No. 322033, ACE and DCI likewise challenge the trial court's determinations that they violated MUFTA and were liable on promissory notes executed in plaintiffs' favor. They further challenge the trial court's finding that plaintiffs were entitled to claim and delivery and judicial foreclosure of collateral.

Finding no errors warranting reversal, we affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

Many of the background facts are largely undisputed. In 1983, Harry Nichols and his sons, Angelo Nichols and Art Nichols, formed ACE, an automotive electronics engineering firm. Plaintiffs, and especially Frank Warchol, became acquainted with ACE in the 1990's and began offering mentoring advice and loans. ACE decided to shift its focus from the automotive industry to the military industry and, once again, plaintiffs loaned ACE funds for the development of military equipment. These loans were secured by promissory notes and security agreements. Richcraft loaned ACE $240,000 from May 2002 to October 2002. The parties entered into a security agreement on May 16, 2002, covering all of ACE's assets. The trusts loaned ACE and DCI over $2,000,000 from 2002 to 2008. The trusts and ACE entered into a security agreement on January 29, 2003.

ACE developed the Advanced Loading Pallet System (ALPS) that would be used in Chinook helicopters. However, ACE lost a lucrative bid from the United States Army to a competitor. ACE believed that the bid was lost because of its high debt-to-income ratio. As a result, the Nichols created a new company – DCI. ACE transferred all of its assets to DCI. On December 31, 2008, DCI then executed a security agreement in plaintiffs' favor, pledging those

assets to secure ACE's previously incurred debts. DCI then won a contract from the US Army on its Cargo On/Off Loading System (COOLS), but production never materialized.

At that same time in 2008, the Australian Defence Force (ADF) awarded DCI a contract to develop the seating of its Chinook helicopters. Although the designs were not integrated, ADF once again contracted with DCI in 2011 for the design of a Main Cabin Upgrade (MCU), which would be funded by the ADF.[1] The project would take place in two separate phases. "Phase I" was the design phase and "Phase II" was the production phase. While Phase I was awarded to DCI, there was no guarantee that DCI would be awarded the contract for Phase II.

John LaFiura, who lived in New Jersey, was familiar with ACE and DCI, having done machine work for them in the past. When LaFiura learned that DCI had been awarded Phase I of the contract, he decided to begin a "clean" company – AMI. Ostensibly, this clean company would make it easier to become a government subcontractor. Thus, AMI was incorporated for the purpose of machining parts during Phase II. LaFiura was AMI's sole owner.

Near the time DCI was awarded the ADF project, DCI asked plaintiffs to subordinate their first priority loans so that DCI could obtain third-party lending and avoid bankruptcy. The Warchols' daughter, Karen Wudcoski, hired an attorney, took over communications with DCI, and demanded payments on the promissory notes. ADF learned of DCI's financial instability and threatened to discontinue working with DCI on Phase I and made it known that DCI would not be considered as a contractor for Phase II. DCI decided to "subcontract" the remainder of work on Phase I to AMI. DCI and AMI entered into the subcontract on March 1, 2012. AMI agreed to perform DCI's obligations under Phase I in hopes of securing an advantage when bidding on Phase II. To that end, AMI assumed DCI's lease, hired its staff, and paid certain debts to critical vendors. AMI opened a special account that included DCI so that the ADF could directly deposit payment for work on Phase I into the account. The funds were then transferred to AMI's general account. Ultimately, AMI successfully bid for the Phase II production contract with ADF.

The day before plaintiffs' brought suit, DCI went dormant and paid various individuals with its remaining funds. AMI began its operations the day plaintiffs filed suit in March 2012. Plaintiffs alleged that the subcontract between DCI and AMI was effectuated so that DCI could avoid the debt owed to plaintiffs. Plaintiffs' second amended complaint alleged:

Count I: declaratory judgment against DCI and ACE;

Count II: claim and delivery against DCI and ACE;

Count III: judicial foreclosure of personal property against DCI and ACE;

[1] The parties disagree as to whether the MCU was completely new or whether it was a modification of the ALPs and COOLS systems.

Count IV: breach of the secured promissory notes against defendant DCI and ACE;

Count V: violation of MUFTA against DCI

Count VI: violation of MUFTA against AMI

Count VII: civil conspiracy against DCI and AMI;

Count VIII: successor liability against defendant AMI;

Count IX: piercing the corporate veil against AMI; and

Count X: injunctive relief against defendants DCI and AMI.

On February 25, 2013, the trial court granted plaintiffs partial summary disposition on Counts I-IV. The trial court denied ACE and DCI's motion for reconsideration. Later, on August 29, 2013, the trial court granted plaintiffs summary disposition on counts V-VIII and X.[2] In a May 31, 2014 order, the trial court entered judgment in favor of Richcraft in the amount of $503,343.05 and in favor of the trusts in the amount of $3,569,946.44 against ACE, DCI, and AMI. Plaintiffs were permitted to foreclose on their security interest. The trial court also awarded plaintiffs $104,725 in attorney fees. In separate but consolidated appeals, ACE, DCI and AMI appeal the trial court's summary disposition orders.

## II. STANDARD OF REVIEW

"We review de novo motions for summary disposition brought under MCR 2.116(C)(10)." *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012).

> Because a motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint, the circuit court must consider the affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . .in the light most favorable to the party opposing the motion. If the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. [*Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012) (internal footnotes omitted).]

However, "[a] court is not permitted to assess credibility, or to determine facts on a motion for summary judgment. Instead, the court's task is to review the record evidence, and all reasonable inferences therefrom, and decide whether a genuine issue of any material fact exists to warrant a trial." *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994); see also *Debano-Griffin v Lake County*, 493 Mich 167, 175; 828 NW2d 634 (2013).

[2] The trial court declined to pierce the corporate veil, finding the request unnecessary under the circumstances.

## III. DOCKET 322029

### A. PLAINTIFFS' MUFTA CLAIM

AMI argues that the trial court erred in granting partial summary disposition on plaintiffs' MUFTA claim. We disagree.

Our Court recently set forth the principles behind MUFTA:

> "The modern law of fraudulent transfers had its origin in the Statute of 13 Elizabeth, which invalidated 'covinous and fraudulent' transfers designed 'to delay, hinder or defraud creditors and others.' " *BFP v Resolution Trust Corp.,* 511 US 531, 540, 114 S Ct 1757, 128 L Ed 2d 556 (1994) (citation omitted). The Uniform Fraudulent Transfer Act (UFTA), promulgated by the National Conference of Commissioners on Uniform State Laws, codifies the common law. The UFTA is "designed to prevent debtors from transferring their property in bad faith before creditors can reach it." *BMG Music v Martinez,* 74 F 3d 87, 89 (CA5, 1996). The Supreme Court of Wisconsin has explained, "The Uniform Fraudulent Transfer Act reflects a strong desire to protect creditors and to allow for the smooth functioning of our credit-based society. It is a creditor-protection statute. Without such protection for creditors, '[c]reditors would generally be unwilling to assume the risk of the debtor's fraudulent transfers.' " *Badger State Bank v Taylor,* 2004 WI 128, ¶ 41, 276 Wis 2d 312, 688 NW2d 439 (2004) (citations omitted) (alteration in original). Our Legislature enacted the MUFTA in 1998.
>
> The MUFTA defines two species of fraudulent transfers. The first encompasses transfers made "[w]ith actual intent to hinder, delay, or defraud" a creditor and applies to transfers made either before or after the creditor's claim arose. MCL 566.34(1)(a). The second, commonly called "fraud in law" or constructive fraud, deems certain transactions fraudulent regardless of the creditor's ability to prove the debtor's actual intent. It applies only to transfers made after the creditor's claim arose. Three elements of proof are required: (1) that the creditor's claim arose before the transfer, (2) the debtor was insolvent or became insolvent as a result of the transfer, and (3) the debtor did not receive "reasonably equivalent value in exchange for the transfer...." MCL 566.35(1). [*Dillard v Schlussel*, 308 Mich App 429, 445-447; 865 NW2d 648 (2014) (internal footnote omitted).]

In granting partial summary disposition on this issue, the trial court found that there was both actual and constructive fraud. The trial court noted that the subcontract agreement between DCI and AMI "resulted in a transfer of substantially all – if not all – of defendant DCI's assets to defendant AMI. Defendant AMI would subsequently hire all of defendant DCI's employees (including Angelo Nichols and Arthur Nichols)." The trial court acknowledged that while AMI had agreed to pay certain of DCI's debts under the subcontract agreement it did so "for its own benefit" and showed preference for some of DCI's debtors "at the expense of plaintiffs." The trial court further noted that DCI was insolvent at the time of the transfer and, therefore, "reasonable minds could only conclude the transfer was fraudulent with respect to plaintiffs

under MCL 566.34(1)(a) and/or (b). The transfer would also be fraudulent under MCL 566.35(1) (plaintiffs' claims arose before the transfer, defendant DCI did not receive a reasonably equivalent value in exchange for the transfer and defendant DCI was insolvent at the time of the transfer)."

1. TRANSFER OF ASSETS

AMI first argues that no assets were ever transferred from DCI to AMI. AMI contends that a subcontract, and nothing more, existed between AMI and DCI to finish Phase I. Specifically, AMI points to the fact that Phase II work was not an asset belonging to DCI because DCI had no property interest in Phase II and "one cannot transfer what one does not have." Moreover, AMI argues that DCI never transferred any of its equipment or intellectual property to AMI; rather, AMI simply used DCI's equipment to complete Phase I. As proof that no transfer took place, AMI points to the fact that three months after the subcontract was executed, plaintiffs and DCI were discussing the surrender of DCI's assets for credit against the outstanding loans.

In response, plaintiffs point to the glossary definitions of "transfer," "asset," and "property" in MCL 566.61. "'Transfer' means every mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an asset or an interest in an asset. Transfer includes payment of money, release, lease, and creation of a lien or other encumbrance." MCL 566.61(l). "'Asset' means property of a debtor . . ." MCL 566.61(b). "'Property' means anything that may be the subject of ownership." MCL 566.31(j).

Our review of the record reveals that the trial court correctly found that a transfer of all or substantially all of DCI's assets occurred.

The trial court noted that the subcontract agreement between DCI and AMI "resulted in a transfer of substantially all – if not all – of defendant DCI's assets to defendant AMI. Defendant AMI would subsequently hire all of defendant DCI's employees (including Angelo Nichols and Arthur Nichols)." The trial court found that this transfer resulted in AMI receiving something for which it did not pay:

> As a result of the transfer and Subcontract Agreement, defendant AMI admits it sought to not only obtain the remaining payments for completing the Phase I work but also hoped to win the lucrative (over $6 million) Phase II work. Significantly, defendant AMI subsequently promoted itself as uniquely qualified to perform the Phase II work given its relationship with defendant DCI and did win that contract. However, defendant AMI did not pay any monetary consideration or provide other significant consideration to defendant DCI. Thus, defendant DCI did not receive consideration of *substantially the same value* as the assets transferred to defendant AMI.

We can find no fault with the trial court's reasoning. Although AMI focuses on the fact that Phase II had not been awarded yet and, therefore, could not have been an asset, AMI fails to acknowledge that completion on Phase I was an asset DCI transferred to AMI. AMI does not dispute that it used DCI's facility and all of DCI's equipment, as well as DCI's employees to

complete Phase I. This coincided with DCI's financial decline. The subcontract was entered into on March 1, 2012 and DCI stopped doing business on February 29, 2012. DCI performed no separate work, had no employees, and incurred no expenses. Therefore, the trial court properly concluded that a transfer occurred without DCI receiving the equivalent value.

2. ACTUAL FRAUD

AMI argues that the evidence fell far short of intentional fraud and that the issue of intent should have been left for the trier of fact. Again, we disagree.

MCL 566.34(1) provides, in relevant part:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
>
> > (a) With actual intent to hinder, delay, or defraud any creditor of the debtor.

"Under the framework set forth in MCL 566.34(1)(a), the debtor's state of mind in making a transfer determines whether a transfer qualifies as made with an actually fraudulent intent. But debtors rarely admit to having deliberately placed assets out of the reach of their creditors." *Dillard*, 308 Mich App at 448-449. As a result, the legislature has set forth a non-exhaustive list of factors that may be considered in determining actual intent that coincide with so-called "badges of fraud." *Id.* at 449-450. MCL 566.34(2) provides, in relevant part:

> (2) In determining actual intent under subsection (1)(a), consideration may be given, among other factors, to whether 1 or more of the following occurred:
>
> ***
>
> (d) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit.
>
> (e) The transfer was of substantially all of the debtor's assets.
>
> ***
>
> (h) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred.

> (i) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred.[3]

There is no question that DCI had been threatened with suit before it transferred its assets to AMI. As the trial court noted:

> Defendants DCI and AMI entered into a Subcontract Agreement effective March 1, 2012 in which defendant AMI took over performance of the Phase I work using defendant DCI' s intellectual property and equipment. The question is whether this transfer was fraudulent.
>
> Defendant AMI acknowledges receiving an email from Angelo Nichols on September 25, 2011 that explained defendant DCI's dire financial situation and plaintiffs' called loans. Defendant AMI also acknowledges being aware in late February 2012 that Angelo Nichols had advised that defendant DCI was financially unable to continue with Phase I work.
>
> As part of the Forbearance Agreements, plaintiffs agreed not to file suit to collect the debts owed them. Hence, defendant DCI had obviously been threatened with a suit to collect the debts.

That DCI had been threatened with suit was not reasonably in dispute. MCL 566.34(2)(d).

In addition, as we have just discussed in Section II(A)(1) of this opinion, DCI transferred substantially all– if not all – of its assets. MCL 566.34(2)(e).

To the extent AMI continues to claim that the value DCI received was reasonably equivalent to the value of the asset transferred, we note that "[t]he plain text of MCL 566.34(1) ascribes relevancy to 'reasonably equivalent value in exchange for the transfer' only as to claims brought under § 4(1)(b), and not under § 4(1)(a). 'Unlike constructively fraudulent transfers, the adequacy or equivalence of consideration provided for the actually fraudulent transfer is not material to the question whether the transfer is actually fraudulent.'" *Dillard,* 308 Mich App 455, quoting *In re Cohen*, 199 BR 709, 716 (9th Cir BAP, 1996).

Finally, AMI concedes that DCI became insolvent shortly after the transfer was made. MCL 566.34(2)(i).

While summary disposition is generally "inappropriate for deciding cases premised on intent, good faith, or reasonableness," *Dillard*, 308 Mich App at 456, that does not trump the general rule that there must be genuine issues of material fact left to decide. Here, there are none and the trial court properly determined that actual fraud existed.

3. CONSTRUCTIVE FRAUD

[3] We consider only those factors upon which the trial court relied.

AMI argues that there was no constructive fraud because, even if completion of Phase I would be deemed an asset, Phase I had no monetary value because it would not be profitable. AMI further argues that DCI received reasonable equivalent value when AMI assumed DCI's delinquent rent, taxes, and utilities, which enabled DCI to avoid liability for breaching its contract with ADF.

MCL 566.34(1)(b) provides:

> (1) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation in either of the following:
>
> ***
>
> (b) Without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor did either of the following:
>
> > (*i*) Was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction.

MCL 566.35(1) additionally provides:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

Unlike actual fraud, constructive fraud "is concerned with the economic realities of a transfer rather than the transferor's intent." *Dillard,* 308 Mich App at 457. At issue, then, is whether DCI received a reasonably equivalent value in exchange for the transfer to AMI.

MCL 566.33 provides:

> (1) Value is given for a transfer or an obligation if, in exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or satisfied. Value does not include an unperformed promise made otherwise than in the ordinary course of the promisor's business to furnish support to the debtor or another person.
>
> ***
>
> (3) A transfer is made for present value if the exchange between the debtor and the transferee is intended by them to be contemporaneous and is in fact substantially contemporaneous.

The fact that consideration has been paid has "no utility from a creditor's viewpoint" and "does not satisfy the statutory definition" of value; instead, "'value' is to be determined in light of the purpose of the Act to protect a debtor's estate from being depleted to the prejudice of the debtor's unsecured creditors." *Dillard,* 308 Mich App at 458, quoting 7A Uniform Laws Annotated (Master ed), part II, Uniform Fraudulent Transfer Act, § 3, Comment 2, p 48. As the *Dillard* Court noted, "'Reasonably equivalent value' is a commercial concept. 'The touchstone is whether the transaction conferred realizable commercial value on the debtor reasonably equivalent to the realizable commercial value of the assets transferred.'" *Dillard,* 308 Mich App at 459, quoting *Mellon Bank, NA v Metro Communications, Inc*, 945 F 2d 635, 647 (CA 3, 1991). Thus, indirect value in the form of paying other creditors "is simply inconsequential under the MUFTA." *Dillard,* 308 Mich App at 459.

As the trial court aptly observed: "[w]hile AMI notes it paid certain vendors of defendant DCI, utility bills and back rent, defendant AMI did so directly and for its own benefit. Moreover, these actions evidence defendant AMI's preference of some of defendant DCI's debtors at the expense of plaintiffs." DCI did not receive a reasonably equivalent value in exchange for the transfer and because DCI was insolvent at the time of the transfer, the trial court properly granted plaintiffs summary disposition based on constructive fraud.

B. PLAINTIFFS' CIVIL CONSPIRACY CLAIM

AMI next argues that there were questions of fact as to whether MUFTA had been violated as well as questions of fact as to AMI's tortious intent. We disagree.

"'A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.'" *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003), quoting *Admiral Ins Co v Columbia Cas Ins Co,* 194 Mich App 300, 313; 486 NW2d 351 (1992). "'[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort.'" *Advocacy Org,* 257 Mich App at 384, quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

> The agreement, or preconceived plan, to do the unlawful act is the thing which must be proved. Direct proof of agreement is not required, however, nor is it necessary that a formal agreement be proven. It is sufficient if the circumstances, acts and conduct of the parties establish an agreement in fact. Furthermore, conspiracy may be established by circumstantial evidence and may be based on inference. [*Temborius v Slatkin*, 157 Mich App 587, 600; 403 NW2d 821, 828 (1986).]

In granting plaintiffs summary disposition on this count, the trial court noted that "plaintiffs have viable claims for fraudulent transfers against defendants DCI and AMI. Hence, an underlying actionable tort does exist." The trial court concluded that plaintiffs were entitled

to summary disposition because they had already demonstrated that DCI and AMI conspired to fraudulently transfer assets.[4]

As we discussed in Section III(A), plaintiffs were entitled to judgment as a matter of law on their MUFTA claim. Therefore, contrary to AMI's assertions, no question of material fact remained regarding the MUFTA claim.

We also reject AMI's contention that a question of fact maintained as to AMI's tortious intent. "It is essential that each particular defendant who is to be charged with responsibility shall be proceeding tortiously, which is to say with intent to commit the tort or with negligence. One who innocently does an act which furthers the tortious purpose of another is not acting in concert with him." *Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 354; 351 NW2d 563 (1984). As the trial court correctly noted:

> Defendant AMI was undisputedly aware of defendant DCI's debts to plaintiffs, inability to perform the Phase I work and insolvency. Notwithstanding, defendants DCI and AMI agreed that defendant AMI would take over the Phase I work and receive all future payments for the Phase I work. To this end, defendants DCI and AMI opened a new joint bank account to receive payments from the Australian Department of Defence to limit plaintiffs' ability to attach or seize the funds. Moreover, upon receiving payments in that account, the payments were transferred almost immediately to an account held solely by defendant AMl. As such, defendants DCI and AMI deprived plaintiffs of the only viable means of obtaining payment on the loans.

Though AMI complains that the separate fund was created at the ADF's behest, the fact remains that, by their own admission, the account was created to "maximize AMI's opportunity to actually receive such payments without any attachment or seizure of such funds by the Secured Lenders [plaintiffs] or anyone else . . ." Therefore, AMI proceeded "tortiously" and plaintiffs were entitled to summary disposition on plaintiffs' civil conspiracy claim.

### C. PLAINTIFFS' SUCCESSOR LIABILITY CLAIM

AMI argues that it did not acquire any of DCI's assets and that summary disposition on plaintiffs' successor liability claim was inappropriate. We disagree.

Where a purchase is "accomplished by an exchange of cash for assets, the successor is not liable for its predecessor's liabilities unless one of five narrow exceptions applies." *Foster v Cone-Blanchard Mach Co*, 460 Mich 696, 702; 597 NW2d 506 (1999). The exceptions are:

---

[4] The trial court rejected AMI's attempt to argue that Phase II work was not guaranteed at the time of the subcontract – "AMI'S arguments regarding the Phase II work do not overcome the conspiracy with regard to the Phase I work and preclude entry of summary disposition on the Phase I work.

> (1) where there is an express or implied assumption of liability;
>
> (2) where the transaction amounts to a consolidation or merger;
>
> (3) where the transaction was fraudulent;
>
> (4) where some of the elements of a purchase in good faith were lacking, or where the transfer was without consideration and the creditors of the transferor were not provided for; or
>
> (5) where the transferee corporation was a mere continuation or reincarnation of the old corporation. [*Id.* (internal quotation marks and citations omitted.]

In the trial court, plaintiffs pursued successor liability under exceptions (1) and (5). However, the trial court found that AMI did not expressly assume liability for plaintiffs' loans to DCI because the subcontract language did not support such a finding. Nor was there an implied assumption of liability because, while AMI may have expressly assumed some of the liabilities, there was no indication that it assumed them all. The trial court also rejected the "merger" exception to establish successor liability. However, the trial court nevertheless concluded that AMI had successor liability because, even though plaintiffs "inexplicably" failed to raise the issue, "[i]n light of defendants DCI and AMI's violation of the [MUFTA], they have clearly engaged in fraud." [5]

Contrary to AMI's contention, there are no material questions of fact as to whether it succeeded to DCI's assets. As discussed in Section III(A)(1), the trial court correctly determined that DCI transferred its assets to AMI. And as discussed in Section III(A)(2) and (3) the transfer of assets was fraudulent. As such, plaintiffs were entitled to summary disposition on their successor liability claim.

### D. PLAINTIFFS' REQUESTS FOR INJUNCTIVE RELIEF AND ATTORNEY FEES

AMI acknowledges that issues of injunctive relief and attorney fees are predicated on the success of plaintiffs' substantive claims. Having previously concluded that the trial court properly granted plaintiffs summary disposition against AMI, the trial court likewise properly granted injunctive relief and attorney fees in plaintiffs' favor.

## IV. DOCKET 322033

### A. PLAINTIFFS' BREACH OF PROMISSORY NOTES CLAIM

[5] In granting plaintiffs summary disposition on the issue of successor liability, the trial court referred to its prior opinions, which will be discussed more fully below in our discussion of the issues raised in Docket No. 322033, and confirmed that DCI was liable for the loans made to ACE.

On appeal, defendants[6] argue that DCI could not be found liable for the promissory notes when it was not a signatory on those notes and that DCI's security agreement did not constitute a promise to repay ACE's debts. They further argue that the parties' forbearance agreement was ambiguous and that the trial court erred in finding that the forbearance agreement constituted DCI's distinct and special promise to repay ACE's debts. We disagree.

The trial court found liability solely on its interpretation of the parties' forbearance agreement. We review as a question of law the proper interpretation of a contract. *Miller-Davis Co v Ahrens Const, Inc*, 495 Mich 161, 172; 848 NW2d 95 (2014). "That contracts are enforced according to their terms is a corollary of the parties' liberty to contract." *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503; 741 NW2d 539 (2007). Therefore, "[t]he cardinal rule in interpretation of contracts is to ascertain the intention of the parties." *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). "[W]hen the language of a document is clear and unambiguous, interpretation is limited to the actual words used. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). This is true because "an unambiguous contractual provision is reflective of the parties' intent as a matter of law." *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003).

The parties had entered into a forbearance agreement on December 7, 2011. The trial court indicated: "In exchange for plaintiff's [sic] willingness to temporarily forebear payment, defendants DCI and ACE acknowledged their loan obligations, the validity of the various Secured Promissory Notes and Security Agreements, their lack of defenses to their obligations, the existence of their defaults, they would limit the use of any funds and they would not impair the collateral."[7] The agreement provided, in relevant part:

**FORBEARANCE AGREEMENT**

> THIS FORBEARANCE AGREEMENT (the "Forbearance Agreement") made and entered into effective the seventh (7th) day of December, 2011 by and between Dynamic Control International, Inc., a Michigan corporation of 28175 William Rosso Hwy, Chesterfield Twp, MI 48047 ("DCI") and Applied Computer Engineering, Inc., a Michigan corporation of 24535 Forterra Drive, Warren, MI 48089 ("ACE,") (ACE together with DCI. referred to as the "Borrowers") and the Frank L. Warchol Living Trust u/a/d 12/13/95 and the Virginia J. Warchol Living Trust u/a/d 12/13/95, both of which are located at 43033 W. Kirkwood, Clinton Township, MI 48038 (referred to as the "Warchol Trusts") and Richcraft Industries, Inc., a Michigan Corporation of 6123 King Road, Marine City, MI

[6] For this section of our opinion, "defendants" refer to ACE/DCI.

[7] The trial court concluded that DCI and ACE violated the forbearance agreement when Arthur Nichols was repaid a loan and, therefore, plaintiffs were entitled to declaratory judgment that the forbearance period had expired (Count I). We reject plaintiffs' contention that, in failing to specifically appeal the trial court's ruling in that regard that defendants have waived their remaining arguments.

48039 (Richcraft") (Richcraft together with the Warchol Trusts referred to as the "Lenders"), as follows:

**RECITALS**

A. The Warchol Trusts lent to the Borrowers pursuant to Secured Promissory Notes which have a principal balance of $2,105,000, plus accrued interest (the "Warchol Notes"). Richcraft lent to the Borrowers pursuant to 6 Secured Promissory Notes which have a principal balance of $240,000 (plus a $600.00 advance on 11/30/05) plus accrued interest (the "Richcraft Notes," together with the Warchol Notes, referred to as the "Notes").

B. To secure payment of its indebtedness to the Lenders, Borrowers executed and delivered to the Lenders security agreements pursuant to which Borrower granted lenders security interests in Borrowers' assets as Collateral (as particularly identified on Exhibit A to the Security Agreements (as hereinafter defined)) (the "Lenders' Collateral"). Specifically:

> a. On May 16, 2002, Richcraft and ACE entered into a Security Agreement that created a security interest in favor of Richcraft in ACE's assets (the "ACE/Richcraft Security Agreement'').
>
> b. On January 29, 2003, the Warchol Trusts and ACE entered into a Security Agreement that created a security interest in favor of the Warchol Trusts in ACE's assets (the "ACE/Warchol Security Agreement").
>
> c. On December 31, 2008, the Warchol Trusts and DCI entered into a Security Agreement that created a security interest in favor of the Warchol Trusts in DCI's assets (the "DCI/Warchol Security Agreement," and together with the ACE/Richcraft Security Agreement and the ACE/Warchol Security Agreement, the "Security Agreements"). The DCI/Warchol Security Agreement provides, in part, that not only do DCI's assets secure DCI's obligations to the Warchol Trusts, but they also secure ACE's obligations to the Warchol Trusts.

***

D. On June 8, 2011, the Lenders demanded payment of the Notes by the Borrowers.

E. Payment has not been made by the Borrowers.

F. Borrowers have requested that Lenders forbear from exercising their rights and remedies resulting from the defaults under the Notes and Security Agreements, which defaults are continuing.

G. Lender is willing to agree to forbear from exercising its rights and remedies for the period and on the terms and conditions specified in this Forbearance Agreement.

NOW, THEREFORE, in consideration of the respective agreements, warranties and covenants contained in this Forbearance Agreement, the parties agree, covenant and warrant as follows:

SECTION 1. ACKNOWLEDGEMENT

1.1 **Acknowledgement of Obligations**. Borrowers acknowledge, confirm and agree that, as of the date of this Forbearance Agreement, Borrowers are indebted to Richcraft in the principal amount of $240,600, plus accrued interest, and the Warchol Trusts in the principal amount of $2,105,000, plus accrued interest. Any and all indebtedness under the Notes and Security Agreements, together with interest accrued and accruing thereon are unconditionally owing by Borrowers to Lenders, without offset, defense of any kind, nature, or description whatsoever.

1.2 **Acknowledgement of Security Interests**. Borrowers acknowledge, confirm and agree that to Borrower's knowledge Lenders have and shall continue to have valid, enforceable, and perfected liens on and security interests in the Lenders' Collateral heretofore granted to Lenders pursuant to the Notes and Security Agreements or otherwise granted to or held by Lenders.

1.3 **Binding Effect of Documents**. Borrowers acknowledge, confirm, and agree that (a) the Notes and Security Agreements to which they are parties have been executed and delivered to the Lenders by Borrowers, and each is in full force and effect as of the date of this Forbearance Agreement; (b) the agreements and obligations of Borrowers contained in such documents and in this Forbearance Agreement constitute legal, valid, and binding obligations of Borrowers, enforceable against them in accordance with their respective terms, and Borrowers have no valid defense to the enforcement of such obligations; and (c) Lenders are and shall be entitled to the rights, remedies, and benefits provided for in the Notes and Security Agreements and applicable law.

In granting plaintiffs summary disposition on this count, the trial court simply stated that "defendants DCI and ACE acknowledged defaulting on the Promissory Notes in the Forbearance Agreement." Thereafter, defendants moved for reconsideration, arguing that the plain language of the agreement explicitly precluded recovery of monetary damages against DCI. Specifically, defendants pointed to the language in § 1.3 of the agreement: "Borrowers acknowledge, confirm, and agree that (a) the Notes and Security Agreements *to which they are parties* have been executed and delivered to the Lenders by Borrowers . . ." They argued that because DCI was never a signatory to the promissory notes, there was no undertaking on its part to become liable for ACE's obligations. Alternatively, defendants argued that the agreement was ambiguous. In particular, although § 1.1 could imply that DCI, as a defined borrower, acknowledged indebtedness under the notes, § 1.3 was an acknowledgement of DCI's liability under the notes

*to which it was a party*. Defendants argued that this "internal inconsistency" raised questions of fact and that summary disposition was inappropriate. Defendants sought to introduce parol evidence that the parties never intended that DCI would become liable for ACE's debts.

The trial court rejected these arguments, noting that "DCI signed the Forbearance Agreement in which it essentially acknowledged being defendant ACE's successor in interest." The trial court looked to the many plural instances of "borrowers" in the forbearance agreement and noted that "[t]he Forbearance Agreement clearly defines the term "Borrowers" as both defendants DCI and ACE" such that "defendant DCI plainly chose to obligate itself as an additional borrower of the funds loaned to defendant ACE."

The trial court declined to read § 1.3 of the forbearance agreement in the limited way that DCI did. That section used broad language and "DCI, as a defined borrower in the Forbearance Agreement, made itself a party to an obligor of the Promissory Notes and Security Agreements even if not an actual signatory to those contracts." Because the language of the forbearance was not ambiguous, the trial court concluded that there was no need to resort to parol evidence; instead, "DCI and Ace should have ensured a complete record was available when filing their response; they may not now supplement the record." The trial court again indicated that the "preferential payment of debt was a substantial breach of the Forbearance Agreement. Indeed, in light of defendants DCI and ACE's bleak financial position, they could not have engaged in more egregious behavior."

We fully agree with the trial court. The parties' forbearance agreement is not ambiguous and defendants' attempt to argue otherwise is, at best, unsupported and, at worst, frivolous. "A contract is ambiguous when two provisions 'irreconcilably conflict with each other,' *Klapp v United Ins Group Agency, Inc,* 468 Mich 459, 467; 663 NW2d 447 (2003), or 'when [a term] is equally susceptible to more than a single meaning, *Lansing Mayor v Pub Service Comm,* 470 Mich 154, 166; 680 NW2d 840 (2004)." *Coates*, 276 Mich App at 503-504. The forbearance agreement was clear – "THIS FORBEARANCE AGREEMENT . . . between Dynamic Control International, Inc . . .and Applied Computer Engineering, Inc . . .(ACE together with DCI referred to as the "Borrowers") . . ." DCI and ACE were referred to collectively throughout the remainder of the agreement. Under Section A of the "Recitals," the language provided that "The Warchol Trusts lent to *the Borrowers* pursuant to Secured Promissory Notes which have a principal balance of $2,105,000, plus accrued interest (the "Warchol Notes"). Richcraft lent to *the Borrowers* pursuant to 6 Secured Promissory Notes which have a principal balance of $240,000 (plus a $600.00 advance on 11/30/05) plus accrued interest (the "Richcraft Notes," together with the Warchol Notes, referred to as the "Notes")." Most importantly is § 1.1 of the Acknowledgement portion of the agreement: "*Borrowers* acknowledge, confirm and agree that, as of the date of this Forbearance Agreement, *Borrowers are indebted* to Richcraft in the principal amount of $240,600, plus accrued interest, and the Warchol Trusts in the principal amount of $2,105,000, plus accrued interest. *Any and all indebtedness under the Notes and Security Agreements*, together with interest accrued and accruing thereon are unconditionally *owing by Borrowers* to Lenders . . ."

Even § 1.3, which is where defendants attempt to make their case, is clear: "*Borrowers* acknowledge, confirm, and agree that (a) the Notes and Security Agreements to which they are parties have been executed and delivered to the Lenders by *Borrowers*, and each is in full force

and effect as of the date of this Forbearance Agreement; (b) the agreements and obligations of *Borrowers* contained in such documents . . ." The section uses "borrowers" as that term was broadly defined. There is no ambiguity simply because defendants say so and then provide a tortured reading of the parties' agreement.

Because the forbearance agreement was unambiguous, the trial court properly declined to consider parol evidence that would have contradicted the agreement's plain language. When a contract is ambiguous, "factual development is necessary to determine the intent of the parties and summary disposition is inappropriate." *D'Avanzo*, 223 Mich App at 319. However, "when the language of a document is clear and unambiguous, interpretation is limited to the actual words used and parol evidence is inadmissible to prove a different intent." *Burkhardt*, 260 Mich App at 656 (internal citation omitted). "Only when contractual language is ambiguous does its meaning become a question of fact." *Coates*, 279 Mich App at 504.

The forbearance agreement is clear and unambiguous. Although DCI did not sign any of the promissory notes and signed only one of the security agreements, it nevertheless contractually agreed to be on the hook for ACE's debt. The forbearance agreement is not subject to more than one reasonable interpretation. Therefore, the trial court did not err in granting plaintiffs summary disposition.

B. PLAINTIFFS' "CLAIM AND DELIVERY" AND JUDICIAL FORECLOSURE CLAIMS

Defendants argue that plaintiffs failed to support their claim that they were entitled to possession of and title to the collateral.[8] Specifically, defendants claim that plaintiffs failed to identify the party entitled to possession and the value of the property under MCR 3.105. We conclude that defendants have abandoned this issue for review.

The only law defendants cite is as follows: "While it is indisputable that the applicable provisions of the Uniform Commercial Code, MCL §§ 440.9609-9610, govern the foreclosure of an interest in collateral, all those sections do is provide for the obvious: that if there is an established default under a security agreement, the collateral may be sold at public or private auction. However, the procedures which must be followed are those laid out in detail in MCR 3.105 – and this is where the Warchols failed to meet the requirements of the law." (Defendants' Brief on Appeal, pp 30-31.) But defendants failed to expound or explain the merits of their arguments. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give issues cursory treatment with little or no citation of supporting authority. An appellant's failure to properly address the merits of his assertion of error constitutes abandonment of the issue." *Houghton ex rel Johnson v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003) (internal citations omitted).

Even if the issue was not abandoned, we find defendants' claims lack merit. MCL 440.9609 provides that, "(1) After default, a secured party may do 1 or more of the following: (a) Take possession of the collateral . . ." MCL 440.9610(1) then provides that "[a]fter default, a

[8] ACE concedes that it defaulted on the notes and two security.

secured party may sell, lease, license, or otherwise dispose of any or all of the collateral in its present condition or following any commercially reasonable preparation or processing." Section 2.2(b) of the parties' forbearance agreement specifically provides that "Immediately upon the termination of the Forbearance Period, the Lenders shall be entitled to exercise all of its rights and remedies as a secured party under the Security Agreements and applicable law, and the Borrowers shall grant to the Lenders and its agents immediate peaceful possession of all of the Lenders' Collateral . . ."

Defendants claim that MCR 3.105(H) "la[ys] out in detail" the procedures which must be followed. But a quick review of the court rule reveals that it imposes no procedural obligation on plaintiffs. MCR 3.105(H)(1) provides:

> (H) Judgment.
>
> (1) The judgment must determine
>
> (a) the party entitled to possession of the property,
>
> (b) the value of the property,
>
> (c) the amount of any unpaid debt, and
>
> (d) any damages to be awarded.

In finding that plaintiffs were entitled to immediate possession of the collateral in light of the forbearance agreement, the trial court noted: "Plaintiffs are entitled to *possession* of all of the collateral; there is no evident dispute regarding the *division* of the collateral among plaintiffs. The value of the personal property can be reasonably determined from its assessed value for tax purposes; defendants DCI and ACE have also represented the equipment had a certain loan value. A final judgment has yet to enter. Hence, defendant DCI and ACE's reliance on MCR 3.105(H)(1) to defeat plaintiffs' motion [for summary disposition] is misplaced." Likewise, the trial court concluded that plaintiffs were entitled to judicial foreclosure of personal property under the security agreement and the promissory notes and forbearance agreement "clearly establish the principal balances of the loans."

Given the parties' forbearance agreement and previous security agreements, plaintiffs were clearly entitled to immediate possession and judicial foreclosure of the collateral.

### C. PLAINTIFFS' MUFTA AND CIVIL CONSPIRACY CLAIMS

Defendants join in and incorporate AMI's arguments regarding plaintiffs' MUFTA and civil conspiracy claims. However, we have already determined that the trial court properly entered summary disposition on those claims in Sections III(A) and (B) of this opinion.

Defendants further argue that the trial court's $4,000,000 award was inappropriate because plaintiffs submitted no evidence as to the value of the asset transferred and, therefore, the trial court could not enter any judgment on the MUFTA claims. We disagree.

MCL 566.38(2) of MUFTA provides that "the creditor may recover a judgment for the value of the asset transferred, as adjusted under subsection (3), or the amount necessary to satisfy the creditor's claim, whichever is less." Subsection (e) then provides that "[i]f the judgment under subsection (2) is based upon the value of the asset transferred, the judgment shall be for an amount equal to the value of the asset at the time of the transfer, subject to adjustment as the equities may require." MCL 566.38. Although defendants claim that plaintiffs' damages for the MUFTA claim were zero in the absence of evidence regarding the value of the transferred asset, we find that the argument warrants little discussion, especially in light of DCI's liability on the promissory notes. The amount of damages awarded was the amount owed. Moreover, even if MUFTA was the only claim, it is clear that the trial court properly calculated damages when it noted:

> Contrary to defendants' assertion, the assets fraudulently transferred would include not only Australian Department of Defence payments but also the original Phase I work that defendant DCI handed to defendant AMI. The value of the Phase I work is the amount spent thereon, which is best evidenced by the subject loans that financed the Phase I work. Hence, plaintiffs' damages have the same measure – the amount of the loans as set forth in the Secured Promissory Notes – regardless of the claim asserted.

We discern no error in the trial court's damages award.

Affirmed.

/s/ Karen M. Fort Hood
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly